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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 490

BUS AND TRANSPORT SECURITIES CORPORATION,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

ALBERT E. JAMES,
Counsel for Petitioner.

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Petition.

Bus and Transport Securities Corporation, by its counsel, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit entered in the above cause July 3, 1935 (R. 18) as cause No. 5308 in the said court. Said decision of the United States Circuit Court of Appeals for the Third Circuit affirmed a memorandum opinion and decision of the United States Board of Tax Appeals at Docket No. 63791.

Statement.

The question presented in the said cause is:

Whether the petitioner realized a taxable gain within the meaning of the Revenue Act 1928 by a transaction in which it received the entire capital stock of a corporation in exchange for all of its assets.

The Board of Tax Appeals held that a taxable gain was realized in the year 1929 by reason of the foregoing transaction. The Circuit Court of Appeals for the Third Circuit sustained the decision of the Board of Tax Appeals.

Specification of Errors.

(1) The Circuit Court of Appeals erred in holding that the exchange of property for stock above referred to between the Public Service Coordinated Transport and the Bus and Transport Securities Corporation, this petitioner, was not a reorganization within the meaning of Sections 112 (b) (4) and 112 (i) (1) and 112 (i) (2) of the Revenue Act of 1928.

(2) The Circuit Court of Appeals erred in holding and deciding that the petitioner received a taxable gain by reason of the exchange of its assets for all the capital stock of C. Easman Jacobus. That corporation in turn had as its sole asset shares of the Public Service Corporation of New Jersey which in turn was affiliated with and controlled the Public Service Coordinated Transport, the corporation to which the petitioner transferred its assets and from which it received such stock of C. Easman Jacobus, Inc.

(3) The Circuit Court of Appeals erred in affirming the judgment theretofore entered for the respondent, Commissioner of Internal Revenue, and erred in failing to reverse

said judgment and in failing to direct the entry of an order reversing the said judgment.

(4) The Circuit Court of Appeals erred in affirming the deficiency in tax asserted by the Commissioner of Internal Revenue and in approving the order of the Board redetermining that deficiency.

Reasons for Granting the Writ.

(1) The decision of the Circuit Court of Appeals for the Third Circuit in this case is deemed to be in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in *Minnesota Tea Company* v. *Commissioner*, 76 F. (2d) 797.

(2) Said decision of the Circuit Court of Appeals for the Third Circuit in this cause involves an important question of Federal law which should be settled by this Court. The issue of law in this proceeding involves the construction of the so-called reorganization provisions contained in the several Revenue Acts from 1924 to 1934 inclusive. It is of general interest and great importance both for future guidance and for the construction of prior acts.

(3) Said decision of the Circuit Court of Appeals for the Third Circuit in this cause is probably in conflict with an applicable decision of this Court, *Pinellas Ice and Cold Storage Co.* v. *Commissioner*, 287 U. S. 462.

WHEREFORE it is respectfully submitted that this petition should be granted and writ of certiorari issued accordingly.

ALBERT E. JAMES,
Counsel for the Petitioner.

BRIEF IN SUPPORT OF THE PETITION.

The Findings of Fact and Opinion of the Board of Tax Appeals are unreported except in the record (pp. 7-11). The opinion of the Circuit Court of Appeals (R. 15) is not yet reported.

Jurisdiction.

The decision and order of the Circuit Court of Appeals for the Third Circuit were entered July 3, 1935. Jurisdiction is conferred upon this Court by Section 1003 of the Revenue Act of 1926, c. 27, Section 1003, 44 Stat. 1010, U. S. C. A., Title 26, Sec. 1226.

Question Presented.

The question presented is:

Whether the transfer by a corporation of its assets, consisting of stocks of bus transportation companies, to another corporation in exchange for all the capital stock of a corporation which in turn owned shares of the transportation corporation intending to continue and carry on the business of the said bus companies, constituted a reorganization within the meaning of Sections 112(b)(4) and 112 (i) (1) and 112 (i) (2) of the Revenue Act of 1928.

Statutes.

The statutory provisions pertinent to the above question are all contained in Section 112 of the Revenue Act of 1928 and are as follows:

"SEC. 112. *Recognition of Gain or Loss.*

(a) General Rule.—Upon the sale or exchange of property the entire amount of the gain or loss, determined under Section 111, shall be recognized, except as hereinafter provided in this section.

(b) Exchanges solely in kind.—

(4) Same—Gain of Corporation.—No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.

(i) Definition of reorganization.—As used in this section and Sections 113 and 115—

(1) The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected.

(2) The term 'a party to a reorganization' includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation."

Statement of Facts.

The facts are simple and are fully stated in the pleadings (R. 2-3, 7) and in the memorandum opinion of the Board (R. 8-9). They are as follows:

Prior to the transactions as hereinbelow set forth, C. Easman Jacobus was the owner of practically all of the stock of two corporations—The Butler-Newark Bus Line,

Inc., and the Boonton-Mt. Lakes-Newark Bus Lines, Inc. The stocks had cost C. Easman Jacobus $28,500.

The Public Service Corporation of New Jersey, a corporation engaged in the rendering of public utilities services in the said State, desired to acquire the said two bus lines, and negotiated with the said C. Easman Jacobus. A plan for the said acquisition, hereinafter outlined, was devised and executed.

The Public Service Coordinated Transport, a corporation affiliated with the said Public Service Corporation of New Jersey, caused to be organized, under the laws of the State of New Jersey, the C. Easman Jacobus, Inc., a corporation, and in pursuance of the plan transferred to the said corporation in exchange for all of its capital stock 2,500 shares 6 per cent cumulative preferred stock of the Public Service Corporation of New Jersey.

C. Easman Jacobus personally caused to be organized the petitioner corporation, the Bus and Transport Securities Corporation, and caused petitioner to issue to him and his nominees all of its capital stock in the amount of 2,000 shares in exchange for all of the capital stock then issued and outstanding of the said Butler-Newark Bus Line, Inc., and the said Boonton-Mt. Lakes-Newark Bus Lines, Inc., all in pursuance of the said plan.

Thereupon the Public Service Coordinated Transport Company, in pursuance of the said plan, transferred to petitioner all the said capital stock of C. Easman Jacobus, Inc., and petitioner transferred to the said Public Service Coordinated Transport Company all the said capital stocks of the said Butler-Newark Bus Line, Inc., and the said Boonton-Mt. Lakes-Newark Bus Lines, Inc., all on March 29, 1929.

The fair market value of the said stock of the said C. Easman Jacobus, Inc., at the time acquired by petitioner in the said year 1929 was $274,062.50.

Petitioner filed its return for the said year 1929 at or about the due date thereof and included therein no computation of gain or loss on any transaction or transactions as hereinabove set forth. The Commissioner audited the said return, determined that petitioner had realized a gain of $245,562.50 in the acquisition of the capital stock of C. Easman Jacobus, Inc., in the manner hereinabove stated, and as a result thereof determined the deficiency of $27,011.88, as hereinabove appealed from.

ARGUMENT.

I.

The decision of the Circuit Court of Appeals for the Third Circuit in this case is deemed to be in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in Minnesota Tea Company v. Commissioner, 76 F. (2d) 797.

Briefly stated, the facts in this case are that the Public Service Corporation of New Jersey desired to acquire the capital stock of two operating bus line corporations in New Jersey from the owner of that stock, C. Easman Jacobus. Payment was to be made in capital stock of the Public Service Corporation of New Jersey. The Public Service Corporation of New Jersey caused its subsidiary, Public Service Coordinated Transport, to organize a corporation, C. Easman Jacobus, Inc., and transferred to that corporation twenty-five hundred shares of the preferred stock of the Public Service Corporation of New Jersey.

Mr. Jacobus organized the petitioner and transferred to it the capital stocks of the two operating bus companies.

The petitioner transferred the capital stock of the operating bus companies, which he owned, to the Public Service Coordinated Transport and received in exchange the capital stock of C. Easman Jacobus, Inc. This transaction the

Circuit Court of Appeals held resulted in taxable gain to the petitioner.

The net result of the transaction was that Jacobus, as an individual and owner of two operating bus lines, became indirectly, through his ownership of the capital stock of the petitioner, a stockholder in the Public Service Corporation of New Jersey which, through its subsidiary, acquired said bus lines and continued to operate them. Thus, viewed as an individual transaction, Jacobus continued to have a stake in the business in which he had previously engaged. In *Minnesota Tea Co.* v. *Commissioner*, 76 F. (2d) 797, the Circuit Court of Appeals for the Eighth Circuit reversed the United States Board of Tax Appeals in a similar but not so strong a case for the petitioner and held that taxable gain was not realized from a transaction of this character. In the *Minnesota Tea Co.* case the corporation, then engaged in business, transferred its principal assets to the Grand Union Co. in exchange for a mixed aggregate of cash and stock, which cash was distributed to the stockholders of the Minnesota Tea Co. who paid that corporation's debts and the Minnesota Tea Co. continued to hold the Grand Union Company's stock. Under these circumstances the Board of Tax Appeals held in that case as in the present case that a taxable gain was realized where the seller received the capital stock of the purchasing corporation (28 B. T. A. 591). The Eighth Circuit reversed the Board. The Third Circuit in this case affirmed. Except for the fact that cash also passed in the *Minnesota Tea Co.* case, the facts involved and the principles of law applicable are identical. There is a clear and unmistakable conflict between the decisions of the two circuits.

No attempt will be made in this brief in support of the application for the issuance of the writ of certiorari to argue the correctness as a matter of law of the petitioner's position in this case. That argument belongs more properly

in the brief on the merits, if this petition for the writ is granted.

II.

Said decision of the Circuit Court of Appeals for the Third Circuit in this cause involves an important question of Federal law which should be settled by this Court.

The question presented is difficult and the statutory provisions involved have received attention from this Court in only two decided cases—*Pinellas Ice and Cold Storage Co.* v. *Commissioner*, 287 U. S. 642; *Gregory* v. *Helvering*, 293 U. S. 465, 55 Sup. Ct. Rep. 206. Neither of these cases involved the type of case to which the so-called reorganization provisions apply, that is cases involving transfers to or by corporations wherein the transferring party continues to have a stake in the continued business enterprises. Both the *Pinellas* and the *Gregory* cases involved, in the final analysis, the sale of property for cash, and this Court, looking through the corporate transactions to the real essence of the thing done, held that the transactions fell without the scope of the reorganization provisions.

Section 112 of the Revenue Act of 1928 has its counterpart in Sections 203 of the Revenue Acts of 1924 and 1926 and Sections 112 of the Revenue Acts of 1932 and 1934. For the greater portion of this period these provisions have been copied verbatim from one Revenue Act to the next. Over this period of more than ten years, with essentially the same laws in force, innumerable transactions have occurred in which taxpayers have endeavored to fit the transaction within the statutory provisions, not so much with a view to avoiding taxation, but with the view of achieving certainty in the resulting taxation. A very substantial number of cases have been heard by the Board of Tax Appeals, a very much larger number remain to be heard. A number of such cases have been decided in the various cir-

cuits. Conflicts are beginning to arise, perhaps the clearest conflict being that between this case and *Minnesota Tea Company* v. *Commissioner, supra.* It is very important, both for the guidance of taxpayers in the consummation of future business transactions and for the orderly construction of the Revenue Acts, that the application of these reorganization provisions (so called) to significant states of fact be clarified by this Court.

III.

Said decision of the Circuit Court of Appeals for the Third Circuit in this cause is probably in conflict with an applicable decision of this Court, Pinellas Ice and Cold Storage Co. v. Commissioner, 287 U. S. 462.

Pinellas Ice and Cold Storage Co. v. *Commissioner,* 287 U. S. 462, was the first case considered by this Court involving the construction of the statutory provision here under consideration. The decision of the Circuit Court for the Fifth Circuit was in conflict with the construction given in the administration of the section in the Bureau of Internal Revenue, and the Department of Justice, in the brief for the Government in that case, asked this Court to clarify the parenthetical clause in what is Section 112(i) 1 of the Act involved in this case. Responding to that request, this Court (287 U. S. 469-70) said:

> "The court below held that the facts disclosed failed to show a 'reorganization' within the statutory definition. And, in the circumstances, we approve that conclusion. But the construction which the court seems to have placed upon clause A, paragraph (h)(1), section 203 (26 U. S. C. A., Sec. 934(h)(1), cls. (A, B), we think is too narrow. It conflicts with established practice of the tax officers and, if passed without comment, may produce perplexity.

"The court said: 'It must be assumed that in adopting paragraph (h) Congress intended to use the words "merger" and "consolidation" in their ordinary and accepted meanings. Giving the matter in parentheses the most liberal construction, it is only when there is an acquisition of substantially all the property of another corporation in connection with a merger of consolidation that a reorganization takes place. Clause (B) of the paragraph removes any doubt as to the intention of Congress on this point.'

"The paragraph in question directs: 'The term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation).' The words within the parentheses may not be disregarded. They expand the meaning of 'merger' or 'consolidation' so as to include some things which partake of the nature of a merger or consolidation but are beyond the ordinary and commonly accepted meaning of those words—so as to embrace circumstances difficult to delimit but which in strictness can not be designated as either merger or consolidation. But the mere purchase for money of the assets of one company by another is beyond the evident purpose of the provision, and has no real semblance to a merger or consolidation. Certainly, we think that to be within the exemption the seller must acquire an interest in the affairs of the purchasing company more definite than that incident to ownership of its short-term purchase-money notes. This general view is adopted and well sustained in *Cortland Specialty Co.* v. *Commissioner of Internal Revenue* (C. C. A.) 60 Fed. (2d) 937, 939, 940. It harmonizes with the underlying purpose of the provisions in respect of exemptions and gives some effect to all the words employed."

The words in the parentheses as set forth in the statute

> "(including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation.)"

covers the exact transaction involved in the instant case.

This Court is now asked to grant this writ of certiorari so that it may "delimit" to a further extent the applicability of this parenthetical clause to a transfer, out of which the transferor does "acquire an interest in the affairs of the purchasing company more definite than that incident to ownership of its short-term purchase-money notes." The Court is asked to grant this writ to determine if a "reorganization" occurs in and embraces and includes cases in which the "seller" continues his stake "in the affairs of the purchasing company" by becoming the owner of capital stock in that company and acquiring nothing else on the exchange.

Conclusion.

It is perhaps helpful to read parenthetically into the statutory provisions the exact steps which bring the transaction involved in this case literally within the provisions of Section 112(b)(4) and Section 112 (i) of the Revenue Act of 1928. As so interpolated, Section 112(b)(4) reads as follows:

> "No gain or loss shall be recognized if a corporation"—Bus and Transport Securities Corporation—"a party to a reorganization exchanges property"—the capital stock of Butler-Newark Bus Line, Inc., and Boonton-Mt. Lakes Bus Lines, Inc.—"in pursuance of the plan of reorganization, solely for stock or securities in another corporation"—C. Easman Jacobus, Inc.—"a party to the reorganization."

Pursuing the same interpolation, the transaction falls within the definition of a plan of reorganization as follows:

> (Section 112(i)(1)). "The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation"—Bus and Transport Securities Corporation—"of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation"—C. Easman Jacobus, Inc.—)

Further pursuing the above, the interpolation in Section 112(i)(2) is as follows:

> "The term 'a party to a reorganization' includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation"—Bus and Transport Securities Corporation—"of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation"—C. Easman Jacobus, Inc.—

Literally the petitioner in this proceeding is within the terms of the statute. The transaction fits exactly into the statutory language; since it does so, it is entitled to have that language applied in accordance with its literal meaning and obvious intent.

Crooks v. *Harrelson*, 282 U. S. 55.

Respectfully submitted,

ALBERT E. JAMES,
Attorney for the Petitioner.